# IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

**CWP No.1170/2005**

**Reserved on: 20.9.2007**

**Decided on.24.10.2007**

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**Himachal Shiksha Samiti.** **…Petitioner.**

**Versus**

**State of H.P. and others.** **Respondents.**

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*Coram*

**The Hon'ble Mr. Justice Rajiv Sharma, J.**

*Whether approved for reporting ?*[1]*. yes.*

**For the petitioner :** **Mr. R.K. Sharma Advocate.**

**For the respondents** **Mr. M. S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakashi Sharma, Deputy Advocate Generals for the respondents.**

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**Rajiv Sharma, J.**

The brief facts necessary for the adjudication of the present petition are that the petitioner-society is registered under the Registration Societies Act, 1860. Himachal Shiksha Samiti (hereinafter referred to as the petitioner for brevity sake) is running about 215 schools in Himachal Pradesh in the name and style of Sarswati Vidya Mandir. The petitioner is also running Sarswati Vidya Mandir School (Girls), Nihal, District Bilaspur. The petitioner submitted an application to the competent authority with a prayer that the land adjoining to khasra Nos. 166/1 and 166/2 measuring 2596.30 sq. meters be given to it on lease. In sequel to the application submitted by the petitioner-school, an allotment was made in favour of the school on 25.2.1999. Thereafter the petitioner school had entered into perpetual lease with the State on 23rd April, 1999. The school was served

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? yes

with a notice on 1st June, 2005 bringing to its notice that school has violated clause (2) (e) of the perpetual lease dated 23rd April, 1999. The school was granted 15 days time to file the reply why the lease for the plots comprising khasra Nos. 166/1 and 166/2 should not be cancelled. It appears from the record that in the mean time the school had also submitted an application for permission to complete the construction work, which was turned down by respondent No.2 on 21st June, 2005. The school submitted the detailed reply to the show cause notice on 15.6.2005. In the reply it was primarily contended that the project in question was delayed due to untimely death of its Project Manager Shri Anil Kumar and despite that construction was undertaken collectively on khasra Nos. 166/1, 166/2 and 166/3/2 measuring 4420.68 sq. meters as per the approved plans. The State Government had taken a decision on 21.8.2005 to cancel the lease granted in favour of Sarswati Vidya Mandir (Girls) School in Up-Muhal Nihal on the ground that the lessee had failed to comply with the terms and conditions of the lease deed. Respondent No.2 was consequently directed to take necessary action for the restoration of the land of the Government. Respondent No.2 vide letter dated 18.10.2005 cancelled the perpetual lease and allotment of land made in favour of the petitioner. Consequently the petitioner, as per the reply filed by respondents, was ejected vide rapat rojnamcha No. 127 dated 2.11.2005 and mutation was also sanctioned in favour of the State of H.P. vide mutation No. 125 dated 3.11.2005.

Mr. R.K. Sharma, learned Advocate appearing on behalf of the petitioner had strenuously argued that the decision of the respondents to cancel the lease dated 23rd April, 1999 besides being in violation of the principles of natural justice is arbitrary exercise of powers vested in State functionaries. Mr. Sharma further contended that the only competent

authority to cancel the lease as per the terms and conditions was the Governor but the cancellation has been ordered firstly by the State Government on 21.8.2005 and thereafter by the Deputy Commissioner on 18th October, 2005. He also contended that the petitioner has been discriminated against by the respondents by not taking any action against Smt. Parsini Devi, Jagdish Lal, Munshi Ram and Congress Bhawan though similarly situated.

The learned Advocate General had supported the decision dated 21.8.2005 and 18.10.2005. He had also vehemently argued that since the petitioner had failed to comply with the mandatory provisions of the perpetual lease, therefore, the action of cancellation of lease cannot be termed as arbitrary.

I have heard the learned counsel for the parties and perused the record.

The allotment was made in favour of the petitioner on 25.2.1999. The lease was entered into between the parties on 23rd April, 1999. It will be apt to reproduce clause 2 (d) and (e) of the lease deed which reads thus:

> **"2 (d) The Lessee shall commence the construction on the leased plot within one year of the allotment and shall complete it within eighteen months from the date of allotment unless, for sufficient reasons, an express extension has been obtained by him from the Deputy Commissioner, Bilaspur, for commencement or completion, as the case may be.**
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> **(e) The Lessee shall not use the leased plot for any other purpose except for the construction of school building for which it has/they have been leased and no conversion or use of a different kind from that agreed and incorporated in this indenture will be permissible or valid."**

The detailed procedure for forfeiture or re-entry had been provided under clause 4 of the lease, which reads thus:

> **"4. No forfeiture or re-entry shall be effected excepts as herein provided, without the permission of the Governor of Himachal Pradesh and the Governor shall not permit such forfeiture or re-entry until the Lessor has served on the Lessee a notice in writing:**
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> **(a) specifying the particular breach complained of:**
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> **(b) if the breach is capable of remedy, requiring the Lessee to remedy the breach, and the Lessee fails within a reasonable time from the date of service of the notice to remedy the breach, if it is a capable of remedy: and in the event of forfeiture or re-entry the Governor may in his discretion relieve against forfeiture of such terms and conditions as he thinks proper.**
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> **Nothing in this clause shall apply to entry for breach of covenants contained in clauses (f) and (h) hereinbefore contained."**

The petitioner was served with a notice on 1st June, 2005 by respondent No.2. It is evident from the text of notice dated 1st June, 2005 that the petitioner was called upon to file the reply for the alleged violation of clause 2 (d) and (e) of the lease dated 23rd April, 1999. An application preferred by the petitioner for enlargement of time for raising construction was rejected on 21st June, 2005. The primary reason for the rejection of the case of the petitioner for enlargement of time was that the same was sought after a period of four years. The petitioner had filed the detailed reply to the show cause notice dated 1.6.2005. It is clear from the communication dated 21st August, 2005 that the State had decided to cancel the lease entered into between the parties on the premise that the lessee had failed to comply with the terms and conditions of lease deed. The text of letter dated 21.10.2005 though mentions about the show cause notice dated 1.6.2005 but the reply filed thereto has not been considered

at all. It was necessary for the respondents to take into consideration the explanation put forth by the petitioner to the show cause notice dated 1.6.2005. The order dated 21.8.2005 is liable to be quashed only on the short ground that it is in violation of the principle of natural justice.

The lease was entered into between the parties on 23.4.1999. The construction was to be raised within one year and the same was to be completed within 18 months from the date of allotment i.e. 25.2.1999. There is a provision for extension of time to be granted by the Deputy Commissioner, Bilaspur. The petitioner had assigned two reasons why the construction could not be completed within the prescribed period. Firstly, it was due to the untimely death of Sh. Anil Kumar, Project Manager and secondly that the school was bound to have play ground as per the instructions issued by the H.P. Board of School Education, Dharamshala. These two grounds assigned by the petitioner were sufficient to enlarge the time in case of the petitioner as well for raising the construction. The application preferred by the petitioner has been rejected by the Deputy Commissioner without a speaking order. The only short ground assigned is that the application was barred by time. The petitioner has not been treated in a just and fair manner. The petitioner had given the specific instances whereby the persons have been permitted to retain the land allotted to them though no construction was raised by them within the stipulated period. The land bearing khasra No.1021/1 in Roura-3 was allotted for the construction of Congress Bhawan in the year 1988, but no notice had been issued to it for not raising the construction within the stipulated period. The only explanation put forth by the respondents in their reply is that as far as persons, namely, Sh. Jagdish Lal and Munshi Ram are concerned, they were served with the notices and they had completed the construction over the allotted land. With regard to Smt.

Parsini Devi, the explanation given is that since she had expired and her legal representatives had given in writing to raise the construction within one year after making necessary entries in the record of rights of their succession. Similar treatment should have been accorded to the petitioner by extending time since it is specifically provided in clause 2 (d) of the lease itself. The other reason for extending time qua Smt. Parsini Devi, Jagdish Lal and Munshi Ram is that they being oustees of Bhakhra Dam were required to be rehabilitated by the State. The explanation for Congress Bhawan is very strange. The explanation is that since the matter had been brought to the notice of respondents, it will be inquired into and only thereafter action as per law will be taken. In the totality of the circumstances, the manner in which the petitioner's case has been considered and rejected smacks of invidious discrimination. If the time had been enlarged in the cases whose details have been mentioned above, the same treatment should have been meted out to the petitioner particularly when it is an educational instutiton. It was incumbent upon the Deputy Commissioner to decide the matter in a reasonable manner.

The matter is required to be looked into from another angle. The lease was entered into between the State and the petitioner-school on 23rd April, 1999. It is evident from the language employed in clause (4) of the lease deed that no forfeiture or re-entry shall be effected except as provided and without the permission of the Governor of Himachal Pradesh. It is further stated in clause (4) that the Government has to issue notice in writing before any action is taken towards the cancellation of the lease. In the present case, the State Government had taken the decision on its own on 21.8.2005 that too in violation of the principles of natural justice as well as without the permission of the Governor while cancelling the lease. Respondent No.2 on its own has further cancelled

the lease on 18.10.2005. Respondent No.2 had no authority under law whatsoever to cancel the lease dated 23rd April, 1999. The decisions dated 21.8.2005 and 18.10.2005 are bad in the eyes of law and are liable to be struck down. It is evident from the language employed in sub-clause (a) of clause (4) that the opportunity is to be granted to a lessee to remedy the breach and it is only if the lessee fails within a reasonable time to remedy the breach after the service of the notice, the action can be taken against him. In the present case, no notice has ever been issued to the petitioner to remedy the breach which was capable of being remedied.

The purpose of issuing the notice to the parties is to give opportunity to them to defend the case properly and effectively. The reply filed by the petitioner was not at all taken into consideration before the issuance of order dated 21.8.2005. The only breaches which have been pointed out in the notice are with regard to clause 2 (d) and (e). Clause 2(d) provides about the construction on the leased plot and clause 2 (e) provides that lessee shall not use the leased plot for any other purpose. It was necessary for the school to have a play ground as per the instructions of the Secretary, H.P. Board of School Education. The construction was already undertaken by the School as is evident from the reply filed by the petitioner to the show cause notice on khasra Nos. 166/1, 166/2 and 166/3/2 measuring 4420.68 sq. mtrs. The reason for delay in raising the construction was untimely death of Shri Anil Kumar, Project Manager.

The petitioner had made a representation to the Governor of Himachal Pradesh against the order of Deputy Commissioner dated 21.6.2005. This fact has been admitted by the respondents in their reply. The Secretary to the Governor was informed by respondent No.2 on 25th August, 2005 that the matter had been referred to the State Government on 4.7.2005 and its decision was awaited. The Court is of the opinion that

once the representation has been made and the respondents were aware of the same, the same was required to be addressed to.

The Hon'ble Supreme Court has held in ***Bharat Petroleum Corporation Ltd. versus Maddula Ratnavalli and others***, (2007) 6 SCC 81 that reasonableness and non-arbitrariness are hallmarks of any action by the State and reasonable action is required on the part of the State even where it is acting 'land-lord', 'tenant' and in a 'contractual matters'. Their Lordships have held as under:

> **"The appellant company is a "State" within the meaning of Article 12 of the Constitution of India. It is, therefore, enjoined with a duty to act fairly and reasonably. Just because it has been conferred with a statutory power, the same by itself would not mean that exercise thereof in any manner whatsoever will meet the requirements of law. The statute uses the words "if so desired by the Central Government". Such a desire cannot be based upon a subjective satisfaction. It must be based on objective criteria. Indisputably, the 1976 Act is a special statute. It overrides the provisions of Section 107 of the Transfer of Property Act. The action of the State, however, must be judged on the touchstone of reasonableness. Learned counsel for both the parties have relied upon a three-Judge Bench decision of this Court in Bharat Petroleum Corpn. Ltd. versus P. Kesavan, (1998) 1 SCC 591 wherein this Court held: (SCC p.777, para 11)**
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> **"11. The said Act is a special statute vis-à-vis the Transfer of Property Act which is a general statute. By reason of the provisions of the said Act, the right, title and interest of Burmah Shell vested in the Central Government and consequently in the appellant Company. A lease of immovable property is also an asset and/or right in an immovable property. The leasehold right, thus, held by Burmah Shell vested in the appellant. By reason of sub-section (2) of section 5 of the Act, a rightly of renewal was created in the appellant in terms whereof in the event of exercise of its option, the existing lease was renewed for a further term on**

**the same terms and conditions. As noticed hereinabove, section 11 of the Act provides for a non obstante clause."**

**In Kailash Chand versus Dharam Dass, Lahoti, C.J. opined: (SCC p.384, para 12)**

**"12. We find it difficult to accept the construction placed on the third proviso, in para 14 of the judgment in Molar Mal case. In Rakesh Wadhawan versus Jagdamba Industrial Corpn. This Court has held that a statute can never be exhaustive. The legislature is incapable of contemplating all possible situations which may arise in future litigation and in myriad circumstances. The scope is always there for the court to interpret the law with pragmatism and consistently with the demands of varying situations. The construction placed by the court on statutory provisions has to be meaningful. The legislative intent has to be found out and effectuated.**

**'Law is part of the social reality.'**

**(See Law in the Scientific Era by Justice Markandey Katju, 2000 End., p.33)**

**"Though law and justice are not synonymous terms they have a close relationship, as pointed out by the American jurist Rawls. Since one of the aims of the law is to provide order and peace in society, and since order and peace cannot last long if it is based on injustice, it follows that a legal system that cannot meet the demands of justice will not survive long. As Rawls says: "Laws and institutions no matter how efficient and well arranged, must be reformed or abolished if they are unjust." (ibid, p.72.)**

**Clearly, law cannot be so interpreted as would cause oppression or be unjust."**

**This Court number of times has laid emphasis on reasonable action on the part of the State even as a landlord. (See Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293 and in contractual matters – Noble Resources Ltd. versus State of Orissa, (2006) 10 SCC 236 and State of Karnataka versus All India Manufacturers Organization, (2006) 4 SCC 683**

**Reasonableness and non-arbitrariness are the hallmarks of an action by the State. Judged from any angle, the action on the**

**part of the appellant does not satisfy the test of fairness or unreasonableness. It being wholly arbitrary cannot be sustained."**

Consequently the writ petition is allowed. Annexures R-4 dated 21.8.2005 and Annexure P-5 dated 18.10.2005 are quashed and set aside. The respondents are directed to hand over the possession of the land bearing khasra Nos. 166/1 and 166/2 measuring 2596.30 sq. meters to the petitioner and the entries made in rapat rojnamacha No. 127 dated 2.11.2005 and the mutation No.125 dated 3.11.2005 are declared null and void. The necessary revenue entries be made in favour of the petitioner after putting it back to possession. The necessary compliance be made within three months from the date of receipt of certified copy of this judgment. There shall be no order as to costs.

**( Rajiv Sharma), Judge**

October 24, 2007
**Awasthi**